United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 09-1692**
	)	**Issued: August 11, 2010**
DEPARTMENT OF THE NAVY, NAVAL ELECTRONICS SYSTEM COMMUNICATION, Charleston, SC, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2009 appellant, through her attorney, filed a timely appeal from a May 20, 2009 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed an October 22, 2008 decision that terminated her medical benefits for dysphagia and chronic pharyngitis. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether Office properly terminated appellant's medical benefits effective October 22, 2008 for her accepted dysphagia and chronic pharyngitis conditions.

[1] For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of Office decisions issued on and after November 19, 2008 must be filed within 180 days. 20 C.F.R. § 501.3(e).

On appeal, appellant contends that the Office did not meet its burden of proof as the medical evidence it relied upon was obtained through doctor shopping. Appellant also continues to contend that the Office should accept appellant's other alleged conditions, including a consequential emotional condition.

FACTUAL HISTORY

This case has previously been before the Board. In a September 25, 2009 decision, the Board affirmed Office decisions denying appellant's request to accept her claim for vocal chord dysfunction, shortness of breath, allergic rhinitis/hay fever, reactive airway dysfunction, persistent cough, gastroesophageal reflux disease, sleep apnea or to authorize polysomnography testing.[2] The Board also found that the Office properly denied a consequential emotional condition. The findings of fact as set forth in the prior decision are incorporated by reference.[3]

The evidence relevant to this appeal is set forth. The Office found a conflict in medical opinion between Dr. Nicholas J. Pastis, Jr., an attending Board-certified internist, and Dr. Robert L. Thomas,[4] a second opinion physician Board-certified in pulmonary disease and critical care medicine, as to the nature and extent of appellant's capacity for work. On August 27, 2007 it referred her to Dr. Cary E. Fechter, a physician Board-certified in internal medicine and pulmonary disease, selected as the impartial medical examiner.

On September 18, 2007 Dr. Fechter noted the history of appellant's exposure to paint fumes three times in her employment, the most recent being on December 1, 2005. He provided findings on examination and reviewed appellant's history of medical treatment. Dr. Fechter obtained pulmonary function studies, which he advised were worse than on previous testing. Appellant had not used her medication that morning and her forced expiratory volume was 52 percent of predicted. Dr. Fechter diagnosed occupationally-induced asthma due to her exposure to strong paint fumes on July 15, 2004, February 28 and December 1, 2005. He found that appellant was totally disabled due to her moderate severe pulmonary abnormalities and not capable of sedentary employment.

On November 21, 2007 the Office faxed a request to Dr. Fechter for clarification of his medical opinion. Dr. Fechter was advised that further opinion was sought concerning appellant's

[2] Docket Nos. 08-2377 & 09-196 (issued September 25, 2009).

[3] On December 1, 2005 appellant sustained an allergic reaction to smelling paint fumes. The Office assigned claim file number xxxxxx122 and accepted dysphagia, chronic pharyngitis and chronic obstructive asthma. Appellant was placed on the periodic rolls for temporary total disability. Appellant continues to receive wage-loss benefits on the periodic roll. Under claim file number xxxxxx657, she alleged that on July 14, 2004 she sustained an allergic reaction to smelling paint fumes. Under claim file number xxxxxx168, appellant alleged that on February 28, 2005 she again had an allergic reaction to smelling paint fumes. On December 31, 2007 the Office combined the claim files.

[4] On December 19, 2006 Dr. Thomas diagnosed occupational asthma, dysphagia, chronic pharyngitis, hypertension and type two diabetes. He noted that appellant had been exposed three times to paint fumes at work which resulted in asthma attacks. Dr. Thomas found that she was capable of working an eight-hour day provided she was not exposed to dust, fumes and strong smoke or odors.

work capacity. He was asked to review the documentation sent with the original referral, answer the questions posed and complete an attached OWCP-5 form.

On December 5, 2007 the Office referred appellant to Dr. Robert A. Marwick, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Marwick was asked to address appellant's residuals following ear, nose and throat examination and her capacity for work.

In a December 18, 2007 response, Dr. Fechter stated that he had treated appellant for lung disease since September 2007 and agreed with the findings of Dr. Pastis. He stated, "I feel [appellant's] exposure to paint fumes at work caused occupationally-induced asthma with frequent flare ups and lengthy bouts of being short of breath." The record reflects that the Office accepted appellant's claim for chronic obstructive asthma.

In a February 26, 2008 note, Dr. Marwick stated that he saw appellant for complaints of hoarseness after exposure to paint fumes about four years prior. He stated that he performed a flexible laryngoscopy that failed to reveal any lesions. Dr. Marwick briefly noted that appellant's neck showed no nodes, mouth showed good oral hygiene and her ears looked fine. He stated that there were no physical findings on examination and that he would like to see her again when she was having a bad day.

In response to an Office request for clarification, Dr. Marwick provided a March 27, 2008 note stating that he had reviewed the statement of accepted facts. Based on his examination, he reiterated that there were no objective medical findings to support residuals from the medical conditions as described. Dr. Marwick remarked that appellant had a one time exposure to paint fumes approximately four years prior. He concluded that appellant could return to her job as long as it did not involve further exposure to fumes.

On April 9, 2008 the Office issued a notice of proposed termination of medical benefits for the conditions of dysphagia and chronic pharyngitis. It found that Dr. Marwick's report constituted the weight of medical opinion. The Office noted that there was no other current medical evidence providing contrary opinion as to appellant's residuals.

In an April 21, 2008 report, Dr. Pastis reviewed appellant's history of injury and medical treatment. He reported findings on physical examination, noting that spirometry suggested stable moderate restriction. Dr. Pastis noted that appellant did not appear to have an acute exacerbation of her lung disease and continued her on medication.

In an October 22, 2008 decision, the Office terminated appellant's medical benefits for her dysphagia and chronic pharyngitis as of that date. The decision further noted that entitlement to medical and monetary benefits for the condition of asthma continued.[5]

On October 27, 2008 appellant's counsel requested a telephonic hearing before an Office hearing representative that was held on February 9, 2009. Appellant contended that the pretermination notice had not been mailed to either herself or her counsel. She also contended that the opinion of Dr. Marwick was not sufficient to support the termination.

[5] This decision made no findings regarding the accepted condition of allergic reaction to paint fumes.

In treatment records dated November 17, 2008 and January 12, 2009, Dr. Pastis provided findings on physical examination and reiterated the diagnoses of reactive airways disease, obstructive sleep apnea and allergic rhinitis.

In a May 20, 2009 decision, an Office hearing representative affirmed the October 22, 2008 decision terminating appellant's medical benefits for dysphasia and chronic pharyngitis.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[8]

In assessing medical evidence, the weight of a physician's opinion is determined by the opportunity for and thoroughness of the examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale used to explain the conclusions reached.[9]

ANALYSIS

The Office accepted that appellant sustained dysphagia, chronic pharyngitis, chronic obstructive asthma and allergic reaction to paint fumes related to her federal employment. The issue is whether the Office met its burden to terminate medical benefits as of October 22, 2008 for her dysphagia and chronic pharyngitis conditions. The Board finds that the Office did not meet its burden of proof to terminate appellant's medical benefits based on the opinion of Dr. Marwick.

The record reflects that the Office selected Dr. Fechter to act as an impartial medical examiner, after finding a conflict in the medical opinion evidence between Dr. Pastis and Dr. Thomas regarding appellant's capacity for work. In a September 18, 2007 report, he provided findings on physical examination of appellant and reviewed an accurate history pertaining to the exposures to paint fumes accepted in this claim, noting that appellant had been exposed at work to strong paint fumes on July 15, 2004, February 28 and December 1, 2005. Dr. Fechter obtained pulmonary function studies and advised that appellant's pulmonary status

[6] *S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[7] *T.P.*, 58 ECAB 524 (2007).

[8] *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003).

[9] *See Michael S. Mina*, 57 ECAB 379 (2006).

was declining, compared to previous testing. He concluded that she was totally disabled even from performing sedentary employment due to her condition.

The Office sought clarification from Dr. Fechter concerning his medical opinion and the extent of appellant's capacity for work. On November 21, 2007 it requested that he provide additional rationale in support of his opinion. Thereafter, on December 5, 2007 the Office referred appellant to Dr. Marwick, a Board-certified otolaryngologist. Based on Dr. Fechter's December 18, 2007 response, the Office accepted chronic obstructive asthma. Dr. Fechter also noted that he had treated appellant's pulmonary condition since his September 2007 examination.

In *Donald J. Summers*,[10] the impartial medical specialist to whom the employee was referred began treatment of the claimant. The Board noted that a physician is considered an impartial medical specialist only when he is resolving a conflict in medical opinion between a claimant's physician and a physician acting on behalf of the government. If a physician who has served as an impartial medical specialist commences to treat the employee, he can no longer be considered an impartial medical specialist and has become a physician of the employee.[11] This appears to be the case with Dr. Fechter who advised, "I have evaluated and treated [appellant] for her lung disease since September and wholeheartedly concur with the findings of Dr. Pastis." Having provided treatment to her since the impartial evaluation, Dr. Fechter abandoned the role of impartial medical examiner and became an attending physician.

The Office referred appellant to Dr. Marwick for a second opinion evaluation. Counsel contends that this constituted physician shopping. Although the referral to Dr. Marwick did occur before the Office became aware of Dr. Fechter's new role as appellant's treating physician, the Board notes that this question is essentially mooted by the fact that Dr. Fechter has become an attending physician rather than impartial medical examiner.[12] In turn, the reports of Dr. Marwick are deficient and do not support the Office's decision to terminate appellant's medical benefits for her accepted conditions of dysphagia and chronic pharyngitis.

On February 26, 2008 Dr. Marwick provided a brief three-paragraph note in response to the Office's request that he examine appellant. He did not review the statement of accepted facts or set forth an accurate history of the exposures to paint fumes accepted in this claim. Rather, Dr. Marwick noted one exposure, approximately four years prior to evaluation. He listed the names of three prior examining physicians but did not provide any discussion of their findings or how they related to his evaluation. Dr. Marwick did not identify the conditions accepted in this claim by the Office. On physical examination, he noted only that appellant underwent a flexible laryngoscopy that did not reveal any lesions. These deficiencies were not cured by Dr. Marwick's similarly succinct letter of March 27, 2008. He merely noted that he reviewed the statement of accepted facts and "found no objective medical evidence to support a residual from

[10] 37 ECAB 634 (1986).

[11] *Id*. at 640 n.6.

[12] The Board has long recognized the discretionary authority delegated under section 8123 authorizing the Office to refer claimants for medical examination. *See Brenda C. McQuiston*, 54 ECAB 816 (2003) (the Office did not meet its burden of proof to terminate compensation due to leading questions prepared for the examining physicians).

the medical conditions described." Dr. Marwick's recitation of the facts is not accurate. He stated that appellant had a "one time exposure to paint fumes four years ago" when in fact the Office has accepted three exposures to paint fumes. It is well established that to be of probative value a medical opinion must be based on a complete and accurate factual and medical background. Medical opinions based on an incomplete or inaccurate history are of diminished probative value.[13]

A medical opinion which is the basis of termination of benefits must also provide medical rationale in support of its conclusion, based upon a thorough medical examination.[14] Dr. Marwick's report offers generalized conclusions, but no such rationalized medical opinion.

The Board is not persuaded by the opinion of Dr. Marwick that appellant no longer has residuals of the accepted conditions. In terminating benefits, it was the only evidence relied upon by the Office.

For these reasons, Dr. Marwick's opinion is insufficient to establish that appellant's accepted conditions of dysphagia and chronic pharyngitis had resolved.

The Board notes that on appeal appellant's representative continues to argue that the Office should accept additional medical conditions and a consequential emotional condition. These arguments were however the subject of appellant's prior appeals, and were not reviewed again in the October 22, 2008 or May 20, 2009 decisions, which only terminated medical benefits for dysphagia and chronic pharyngitis. The Board therefore lacks jurisdiction to review these issues.[15]

CONCLUSION

The Board finds that the Office failed to establish that appellant has no residuals of her accepted dysphagia and chronic pharyngitis conditions. The Office did not meet its burden of proof to terminate her medical benefits.

[13] *M.W.*, 57 ECAB 710 (2006); *James R. Taylor*, 56 ECAB 537 (2005); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[14] *See Michael S. Mina*, 57 ECAB 379 (2006).

[15] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2009 decision of the Office of Workers' Compensation Programs be reversed.

Issued: August 11, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board